BEFORE THE REAL ESTATE AGENTS DISCIPLINARY TRIBUNAL

[2020] NZREADT 06

READT 045/19

IN THE MATTER OF	An appeal under section 111 of the Real Estate Agents Act 2008
BETWEEN	
	RICHARD GRANT WHEELER Appellant
AND	THE REAL ESTATE AGENTS AUTHORITY (CAC 1901) First Respondent
AND	MICHAEL LEDGER Second Respondent
On the papers	
Tribunal	Mr J Doogue (Deputy Chairperson) Mr G Denley (Member) Mr N O'Connor (Member)
Submissions filed by:	Mr R Wheeler, appellant Ms E Woolley, on behalf of the Authority Mr P Brownless, on behalf of the Second Respondents
Date of Ruling:	4 May 2020

RULING OF THE TRIBUNAL
(Application to submit further evidence on appeal)

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[1] Mr Wheeler has brought an appeal against the conclusions of Complaints Assessment Committee 1901 (**the Committee**) which in a decision dated 29 October 2019 decided that no further action should be taken on complaints which he made against the licensee, Mr Ledger. A hearing is pending in this proceeding of an appeal. Mr Wheeler has brought an application seeking leave to refer to certain evidence at the hearing of the appeal which was not before the Committee. He requires the leave of the Tribunal to adduce this evidence. In this decision we will consider the application that Mr Wheeler has brought.

[2] The application which Mr Wheeler brings also seeks directions that certain documents that were available for the hearing before the committee should be included in the bundle of documents for the hearing of the appeal.

[3] The brief background of the matter is as follows. By an agreement entered into at the end of 2018, Mr Wheeler purchased a house in Silverstream. Mr Ledger, the respondent, was the licensee representing the vendor, Dr Simons. One of the complaints, and that which is the one to which the current application applies, concerned a flooding event which had occurred in the house property nine years previously. The flooding resulted from the breakage of a water pipe connected to the dishwashing machine. The complaint which Mr Wheeler makes is that Mr Ledger, although he had been told about the flooding, did not disclose it to those interested in purchasing the property and in fact recommended to the vendor, Dr Simons, that he not make any mention of it to those interested in purchasing the property.

[4] Mr Ledger does not dispute that he knew about the event. His view was that any damage which had been done to the property including the repairs of the water line had been attended to at the time. Mr Ledger considers that there was no need for the event to be disclosed because it was not a current or relevant event that would affect the judgement of potential buyers. While the event had occurred, all of the consequences of it had been remedied and it was no longer of relevance. He agrees that his advice to the vendor reflected that view. Mr Ledger does not dispute that the flooding event occurred. What he does dispute is whether he had any obligation to disclose the event to Mr Wheeler as the purchaser of the property.

[5] A written statement which the previous vendor, Dr Simons, made in November 2019 made concerning the property and which Mr Wheeler wishes to adduce as part of the evidence to be considered by the Tribunal when hearing his appeal against the dismissal of the complaints, includes the following:

> Mr Ledger was also well aware of the 2011 burst dishwasher hose and in fact brought it up before I even got the chance. We discussed it first when doing the initial house walk around where the different carpets are obvious outside the children's bedroom. He presumably knew about it from Anne (our neighbour since before the flood) who works in his office as an agent.
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> I was deployed overseas during the burst hose incident and the rest of the family were in fact overseas with me for three weeks…The repairs were all completed by the insurance company by the time I returned to NZ. I never saw anything of the damage, nor repairs, but was assured everything was repaired to compliance standards. When filling in the house sale contract with Mr Ledger, there is a question on repairs or outstanding maintenance which I hesitated on. He assured me the repairs were now all complete and therefore there was nothing to write down on his very clear and deliberate direction, the form did not mention the flood. I accepted his professional advice in good faith and relied on him to comply with all legal obligations, as the agent selling our house

[6] Mr Wheeler had in fact been in touch with Dr Simons by way of and a lengthy exchange of emails as far back as March 2019. Some of those emails concerned the dishwasher flood.[1] As a result of those discussions, Mr Wheeler requested Dr Simon's to provide the statement, excerpts from which are set out above.

[7] The next question to be examined is the basis upon which the Tribunal decides whether to grant leave to a party in the position of Mr Wheeler to produce evidence to it on the hearing of the appeal, which was not available when the matter was heard by the Committee.

[8] In the submissions that were filed on behalf of the Committee, Ms Woolley submitted as follows:

1. Appeal hearings will generally proceed on the record of evidence that was before the Committee and submissions of the parties, without any new evidence. The Court of Appeal in *Nottingham v Real Estate Agents Authority* affirmed the

[1] Refer email from Dr Simons dated 27.03.19

principles set out by the Tribunal in *Eichelbaum v Real Estate Agents Authority*, holding that full oral hearings are only appropriate in "exceptional circumstances".[2] The Tribunal may accept further evidence on appeal if justified.

2. The standard test for admission of further evidence on appeal is that it must be cogent and material, and must not have been reasonably available at first instance.[3] In determining whether to grant leave, the following factors may be taken into account:[4]

   [i] Whether the evidence could have been obtained with reasonable diligence for use at the initial hearing;

   [ii] Whether the evidence would have had an important influence on the outcome;

   [iii] Whether the evidence is apparently credible; and

   [iv] Whether admitting the evidence would require further evidence from other parties and cross-examination.

3. In *Foundation for Anti-Aging Research v The Charities Registration Board*, the Court of Appeal accepted that "natural justice considerations could in some cases require an oral hearing on appeal in order to 'get to the bottom' of the issues".[5] The Court further noted that:[6]

> …there may be cases where, in order to secure the objective or a just and effective right of appeal, the discretion to permit further evidence or carefully limited rights of cross-examination may be necessary and appropriate…The Court will be guided by the usual criteria of freshness, relevance and cogency. Material that would merely elaborate or improve upon the evidence already available in the record of proceedings at first instance is unlikely to meet the test.

4. In *Eichelbaum*, the Tribunal affirmed that its wide procedural powers under the Real Estate Agents Act 2008 give the Tribunal ample scope to apply these principles in a flexible way depending on the circumstances of the case. What is not permissible is to give a party to an appeal the opportunity to run their case

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[2] *Nottingham v Real Estate Agents Authority* [2017] NZCA 1 at [81].

[3] See for example *Telecom Corp of NZ Ltd v CC* [1991] 2 NZLR 557.

[4] See *Eichelbaum v Real Estate Agents Authority* [2016] NZREADT 3 at [49], citing *Dragicevich v Martinovich* [1969] NZLR 306 (CA).

[5] *Foundation for Anti-Aging Research v The Charities Registration Board* [2015] NZCA 449 (21 September 2015) at [35].

[6] *Foundation for Anti-Aging Research*, above n 7 at [51].

afresh simply because they wish they had conducted it differently in the first instance.[7]

[9] The submissions that Mr Brownless made on behalf of Mr Ledger were to substantially the same effect. He submitted that:

> [7.1] At paragraphs [48] – [51] of *Eichelbaum*, the Tribunal detailed the submissions of the REAA, with which it agreed. The standard test for admission of evidence requires (inter-alia):
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> (1) That the evidence be cogent and material;
> (2) That the evidence was not available at the earlier hearing by the exercise of reasonable due diligence;
> (3) Consideration of whether the evidence is apparently credible; and
> (4) consideration of whether admitting the evidence would require evidence from other parties or cross-examination

[10] In our view both sets of submissions correctly summarise the law which is to be applied when deciding an application of the kind that Mr Wheeler has bought.

1. *The Real Estate Authority did not contact the vendor for accurate information in his interactions with Mr Ledger;*
2. *A witnessed statement from the vendor holds critical information to the investigation for Mr Ledger's advice and conduct;*
3. *Mr Ledger failed to disclose a known defect and instructed the vendor to leave the outstanding maintenance and repairs section of the Sale and Purchase Agreement blank;*
4. *Mr Ledger has not followed the REA's "Principles of Disclosure" documented protocol. The Committee have overlooked the REA disclosure requirements. There is no sub-clause in the REA Principles of Disclosure that states "unless repaired under insurance".*
5. *Consent by Customer – the amended document is very economical, misleading and withholds major items noted on the RealSure report. (The RealSure report is not mentioned on this consent form.)*
6. *RealSure report – a copy of this was never shown or given to me – as required. I was solely verbally advised that one existed by Ms Rigden.*

The actual report that Mr Ledger, Mrs Ledger & Ms Rigden were all aware of (by their own admission) it is far more extensive and complex than the very basic items I was advised of by Ms Rigden on the consent form. To the extend where I would of (sic) withdrawn my tender.

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[7] *Eichelbaum v Real Estate Agents Authority* [2016] NZREADT 3 at [51].

[11] The statement from Dr Simon would only be of potential relevance to grounds 1-4 above. It does not have any reference to the questions arising from the alleged non-disclosure of the RealSure report or the consent by customer (grounds 5 and 6).

[12] Based upon the authorities which were referred to in the submissions it is our view that the application that Mr Wheeler brings in regard to the statement that Dr Simons provided to him, 22 November 2019 must be dismissed.

[13] In the first place, the evidence could have been obtained long before the Committee dealt with the complaint. As we have pointed out Mr Wheeler had been in touch with Dr Simons from March 2019 and some of the discussions that he had with Dr Simons were lengthy and detailed. Dr Simons was apparently willing to assist Mr Wheeler. It would seem likely that had Mr Wheeler asked him for the information contained in the November statement which Mr Wheeler now wishes to place in evidence, such a statement would have been forthcoming in addition to the other information that Dr Simons gave to him. The information in this statement could therefore have been obtained in adequate time for it to be placed before the Committee. The application does not meet the requirement that additional evidence must have been such that it could not have been obtained with reasonable diligence in time to put it forward for the Committee's consideration.

[14] As well, the evidence is not material to an issue which is contested between the parties. Mr Ledger does not say that he did not know about the flooding that was caused from the dishwasher. He does not dispute, either, that his view which he expressed to Dr Simons was that it was not necessary to disclose the flooding event because it was of no current relevance. The position that Mr Ledger takes is that he advised the vendor not to disclose the dishwasher flood incident because the damage flowing from that incident had been remedied and it did not constitute a present defect in the property.

[15] He does not deny that he told Dr Simons that was his view. The only issue to which the dishwasher related flood is relevant are whether Mr Ledger breached his obligations under the Act and Rules in acting in accordance with these views. Was he wrong to do not mention the dishwasher flood and to tell the vendor that he did not need to mention it? The statement from Dr Simons that Mr Wheeler wishes to put forward will not help resolve that issue.

[16] The two grounds alone which we have mentioned are the only ones that need to be considered because on their own they make it clear that the application should be dismissed.

[17] The application referred to at paragraph 1 of Mr Wheeler's application of 8 January 2020 is dismissed.

[18] We are informed that the application so far as it relates to omission of documents from the common bundle, which items are referred to at paragraphs 2 and 3 of Mr Wheeler's application have now been dealt with satisfactorily and that no order is required in regard to those issues. We reserve leave to the parties to apply for further directions in regard to those documents if required.

[19] Pursuant to s 113 of the Act, the Tribunal draws the parties' attention to s 116 of the Act, which sets out the right of appeal to the High Court. The procedure to be followed is set out in part 20 of the High Court Rules.

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Mr J Doogue
Deputy Chairperson

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Mr G Denley
Member

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Mr N O'Connor
Member